UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 35

Docket No. DC-0752-08-0669-I-1

Michael J. Axsom,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 13, 2009

Michael J. Axsom, Charlotte, North Carolina, pro se.

Kenyatta McLeod-Poole, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision dismissing his involuntary resignation appeal for lack of jurisdiction. For the reasons set forth below, we DENY the appellant's petition for review because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant worked as a GS-11 Management Analyst for the agency in Washington, D.C., from February 2003 until he resigned effective September 1, 2006. Initial Appeal File (IAF), Tab 5, Vol. II, Subtab B-1 at 116-18; Vol. III, Subtab C-7. Beginning about March 2005, the appellant was working a compressed schedule, Tuesday through Friday, so he could travel on the weekends to North Carolina, where his parents lived and he owned a home, in order to care for his parents. *Id*., Vol. II, Subtab B-1 at 128-31; Vol. I, Subtab B-1 at 13-15. In July 2005, the agency approved his request to use leave under the Family Medical Leave Act of 1993 (FMLA) on an intermittent basis to care for his father, whom it determined suffered from a serious medical condition. *Id*., Vol. III, Subtab C-5 at 447. The agency informed the appellant that he was entitled to up to 12 weeks of FMLA leave over the next 12 months. *Id*.

¶3 In early 2006, the appellant requested permission to telecommute from his home in North Carolina, and the agency denied his request. *Id.*, Vol. III, Subtab C-6 at 452-53, 461-62. On or about March 6, 2006, the appellant ceased coming to work and apparently remained in North Carolina on leave tending to his father. *Id*., Vol. II, Subtab B-2 at 217-18, Subtab B-1 at 172, Subtab B-3 at 241.

¶4 The appellant subsequently sought 12 consecutive weeks of FMLA leave based upon his father's medical condition, and the agency, by memorandum dated August 15, 2006, approved the request. *Id*., Vol. III, Subtab C-5 at 444. However, the agency informed the appellant that the medical documentation he had submitted in support of his request only established a medical basis for such leave through August 31, 2006. *Id*. The agency instructed the appellant to return to work by September 1, 2006, or provide updated medical documentation supporting his absence after that date. *Id.* The agency cautioned him that if he failed to comply with these instructions, he would be charged with absence without leave (AWOL). *Id*. The appellant asserted, and the agency has not disputed, that he did not receive the agency's memorandum until August 28,

2006. IAF, Tab 5, Vol. III, Subtab C-5 at 448, Subtab C-11 at 531. On that day, he sent a fax to the agency stating that he had only received the memorandum that day and that it was impossible to obtain the required medical documentation from his father's medical providers by September 1, 2006. *Id*., Subtab C-5 at 448. He requested a 1-month extension of time to obtain the requested medical documentation. *Id*. In a follow-up e-mail on August 29, 2006, he stated that if the extension was denied, he would resign. *Id.*, Vol. III, Subtab C-11 at 531. On August 30, 2006, having not received a response to his request, the appellant faxed his written resignation to the agency, which he chose to make effective September 1, 2006. *Id*., Vol. III, Subtab C-7 at 464-65. The appellant explained his reasons for the resignation as follows:

> I am a 90% service-connected disabled veteran experiencing a serious decline in overall general health as well as an increase in my service-connected disabilities. This decline in my medical condition is linked directly to my daily 4-6 hr. ardurous commute by car, train & [b]us, & being exposed to hazardous noise. I have seriously ill parents located in North Carolina who need my assistance with medical & life-style needs (currently approved for Family Medical Leave -- declining & poor health). During the last 12 mo's; my request for a hardship transfer, my 9 applications under merit recruitment, requests for a down grade or lateral transfer, and most recently, a request for a reasonable accommodation were all declined. My personnel record and work history is outstanding. During the last 3 yrs, I have been promoted & given cash awards for exemplary duty. My job is primarily accomplished on the computer, my requests were to alleviate the ardurous commute, allow me to regain some of my general health, improve my quality of life, assist parents, & assist the VA in retention. For these reasons, I feel I have no other option than to resign from federal civil service.

Id. at 465 (grammar and syntax as in original).

¶5 The appellant filed formal equal employment opportunity (EEO) complaints with his agency alleging, among other things, that he was constructively discharged on account of his race, gender, disability, prior EEO activity, and religion. IAF, Tab 5, Vol. I, Subtab C-1; Vol. II, Subtab A-4; Vol.

III, Subtab C-10. On July 22, 2008, the agency issued a final decision, finding no discrimination, and this appeal followed. IAF, Tab 1. The administrative judge issued an acknowledgment order noting that the Board lacks jurisdiction over voluntary resignations, explaining what the appellant must do to establish jurisdiction over the matter he is appealing, and directing the appellant to respond on the issue of jurisdiction. IAF, Tab 2 at 2-3. The administrative judge informed the appellant of his right to request a hearing. *Id*. at 1-2. The appellant filed a response, and he stated that he did not want a hearing. IAF, Tab 3. The agency responded in opposition to the appeal. IAF, Tab 5.

¶6 The administrative judge concluded that the appellant failed to present nonfrivolous allegations that his resignation was involuntary and dismissed the appeal for lack of jurisdiction. IAF, Tab 6. The administrative judge held that the mere threat of being charged with AWOL did not suffice to render the resignation coerced. *Id*. at 4. The administrative judge also concluded that the appellant's allegations of discrimination and harassment did not suffice to suggest an intolerable working environment that would have compelled a reasonable person to give up his job. *Id*. at 4-5.

¶7 The appellant has filed a petition for review with the Board, Petition for Review File (PFRF), Tab 1, and the agency has filed a response in opposition, PFRF, Tab 3.

ANALYSIS

¶8 The appellant's petition for review does not identify an error in the initial decision or otherwise meet the criteria for review at 5 C.F.R. § 1201.115; therefore, we DENY it. Nevertheless, we REOPEN this appeal to correct a legal error, which was ultimately harmless in this case.

¶9 The appellant has the burden of proving the Board's jurisdiction by a preponderance of the evidence.[1] *Parrott v. Merit Systems Protection Board*, 519 F.3d 1328, 1332 (Fed. Cir. 2008); 5 C.F.R. § 1201.56(a)(2). The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Section 7513(d) of Title 5 grants the Board jurisdiction to hear appeals of certain enumerated adverse actions, including the agency's removal of an employee. *Parrott*, 519 F.3d at 1332. An employee's voluntary action, such as a resignation, is not generally appealable to the Board. *Id*. However, an involuntary resignation is equivalent to a forced removal and is a matter within the Board's jurisdiction. *Id.* In a case involving such an alleged constructive removal, once the appellant presents nonfrivolous allegations of Board jurisdiction -- allegations of fact that if proven would establish the Board's jurisdiction -- the appellant is entitled to a hearing at which he must prove jurisdiction by a preponderance of the evidence. *Id*.; *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc).

¶10 However, here the appellant clearly and repeatedly asserted that he did not want a hearing, both in his initial appeal and in his response to the administrative judge's acknowledgment order. IAF, Tabs 1, 3. He further reiterated on review that all the necessary information was in the EEO investigative file, which was in the record below, and he has not claimed that the administrative judge erred by deciding this matter without a hearing. PFRF, Tab 1. Thus, the appellant made an informed decision to waive his right to a hearing by clear, unequivocal, and

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[1] A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as adequate to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

decisive action.[2] *See Campbell v. Department of Defense*, 102 M.S.P.R. 178, ¶ 5 (2006). Because the appellant waived his right to a hearing, the issue is not whether he raised a nonfrivolous allegation of jurisdiction, but whether he established jurisdiction by a preponderance of the evidence based upon the written record. *See Vitale v. Department of Veterans Affairs*, 107 M.S.P.R. 501, ¶ 18 (2007). Thus, the proper course here was for the administrative judge to determine whether the appellant had established jurisdiction by a preponderance of the evidence. *See id.*

¶11 In this case, the administrative judge's error was harmless. Because the existing record is fully developed on the jurisdictional issue, the Board may make a jurisdictional determination based on the written record. *See id.* Based on our review of the record, we find that the appellant failed to establish that his resignation was involuntary by a preponderance of the evidence.

¶12 Resignations are presumed to be voluntary, and the appellant bears the burden of proving otherwise. *Terban v. Department of Energy*, 216 F.3d 1021, 1024 (Fed. Cir. 2000). To overcome the presumption that a resignation was voluntary, the employee must show that the resignation was the result of the agency's misinformation or deception, or that the resignation was coerced by the agency. *Id.*; *Vitale*, 107 M.S.P.R. 501, ¶ 19. To establish involuntariness on the basis of coercion, an employee must show that the agency effectively imposed the terms of the employee's resignation, the employee had no realistic alternative but to resign, and the employee's resignation was the result of improper acts by the agency. *Vitale*, 107 M.S.P.R. 501, ¶ 19. The touchstone of the "voluntariness"

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[2] On review, the appellant asserts for the first time that he was denied the opportunity to depose witnesses. PFRF, Tab 1 at 3. Despite this claim, the record clearly shows that he waived his right to a hearing below, and he failed to file any discovery motions with the administrative judge or indicate that he needed to conduct discovery before he could respond to the jurisdictional issues. Further, the appellant failed to identify the witnesses or suggest what relevant, material, and nonrepetitive testimony they might provide. *See Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985).

analysis is whether, considering the totality of the circumstances, factors operated on the employee's decision-making process that deprived him of freedom of choice. *Id.* If an employee claims that his resignation was coerced by the agency creating intolerable working conditions, the employee must show a reasonable employee in his position would have found the working conditions so difficult or unpleasant that they would have felt compelled to resign. *Id.*, ¶ 20. The Board addresses allegations of discrimination and reprisal in connection with an alleged involuntary resignation only insofar as those allegations relate to the issue of voluntariness. *Id.*

¶13 The agency's August 15, 2006 memorandum requesting additional medical documentation, with a short period to comply and a threat of AWOL, was obviously the trigger for the appellant's resignation. IAF, Tab 5, Vol. III, Subtab C-5 at 448-50, Subtab C-11 at 531. However, this agency action did not render the appellant's resignation involuntary, considering the totality of the circumstances.

¶14 The appellant's concern over an AWOL issue is clearly overstated, given that the appellant admitted that he had been charged AWOL numerous times in the past, but he had readily corrected the record in short order on each occasion. *Id.*, Vol. I, Subtab B-1 at 16-18. Furthermore, the appellant acted precipitously, tendering his resignation almost immediately after requesting the extension to respond to the August 15, 2006 memorandum, before any negative action took place. *See Miller v. Department of Defense*, 85 M.S.P.R. 310, ¶ 29 (2000) ("To prove a constructive discharge[,] an employee has an obligation to act reasonably, not assume the worst, and not jump to conclusions too quickly."). On this point, it is noteworthy that the appellant's request for an extension was duly reviewed and granted through September 29, 2006. IAF, Tab 5, Vol. III, Subtab C-5 at 446. In addition, the agency memorandum itself advised the appellant of the potential availability of additional leave (beyond the FMLA limits), a fact inconsistent with coercive pressure to resign. *Id.* at 444. On that same score, an

agency human resources specialist stated that he repeatedly tried to contact the appellant, after the extension to provide documentation was granted, to confirm that the appellant wished to resign rather than return. *Id.*, Vol. III, Subtab C-11 at 534; Vol. II, Subtab B-6 at 300, 307-08, 312. These overtures are also inconsistent with the appellant's claim that the agency compelled his resignation. *See Cruz v. Department of the Navy*, 934 F.2d 1240, 1245 n.5 (Fed. Cir. 1991) (en banc). Thus, the appellant's claim that he was coerced to resign by the agency's request for documentation and the threat of AWOL is utterly refuted by the evidence. *See Vitale*, 107 M.S.P.R. 501, ¶¶ 24-26 (the appellant's placement on sick leave certification did not render his working conditions intolerable such that a reasonable person would have felt compelled to resign); *see also Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶ 12 (2008) (a resignation is not involuntary simply because the appellant had to choose between resigning and opposing an adverse action).

¶15 In making this determination, we have considered the agency's August 15, 2006 memorandum in the context of the totality of the circumstances, including evidence regarding the appellant's employment history with the agency. *See generally Shoaf v. Department of Agriculture*, 260 F.3d 1336, 1342-43 (Fed. Cir. 2001) (the level of evidentiary weight the Board must grant to events temporally distant from the appellant's alleged involuntary resignation is within the Board's discretion, but at a minimum, the Board must consider such events as necessary "to place the activity and inactivity more immediately preceding [the resignation] into the proper context"); *Terban*, 216 F.3d at 1024 (the most probative evidence of involuntariness "will usually be evidence in which there is a relatively short period of time between the employer's alleged coercive act[s] and the employee's retirement"). The appellant has particularly complained about the agency's failure to select or reassign him to a position closer to his parent's home in North Carolina and the agency's denial of his request to telecommute from North Carolina. He has also made allegations of discriminatory, harassing, and

retaliatory conduct that created intolerable working conditions. We have considered the evidence regarding these allegations as it pertains to the issue of the voluntariness of his resignation. *See, e.g.*, *Vitale*, 107 M.S.P.R. 501, ¶ 20.

¶16 The appellant's claims of harassment, retaliation, and discrimination figured only tangentially in his decision to resign, if at all. Notably, the alleged incidents of discrimination and harassment preceded his decision to resign by several months. In addition, the appellant was on family medical leave for an extended period before his resignation, IAF, Tab 5, Vol. II, Subtab B-1 at 168-69, Subtab B-2 at 217-18, Subtab B-3 at 243-44, and thus he had little, if any, contact with any allegedly hostile supervisors in the months leading up to his decision to resign, which further weakens any inference that any alleged harassment and discrimination on their part weighed heavily in his decision.

¶17 Moreover, the appellant had already begun the process for addressing all such claims – he originally filed an EEO action in April 2006, well-before his resignation. *Id*., Vol. II, Subtab A-4. Thus, the appellant had the option to stand and fight the alleged discrimination, harassment, and retaliation rather than resign. *See Garcia*, 437 F.3d at 1329 (the resignation was not involuntary if the employee had a choice whether to resign or contest the validity of the agency action). The appellant has failed to prove that the agency was handling his EEO complaints inequitably or that, under the circumstances, his request for an extension to respond to the August 15, 2006 memorandum or any challenge to an improper agency action taken as a result of that memorandum would have been futile.[3] In fact, the evidence shows that a reasonable person in the appellant's position would have expected that the agency would likely accommodate his request for an extension of time to gather the appropriate medical documentation

[3] Furthermore, there is little support in the record for his claims. Notably, the agency witnesses all contradicted his accounts, *id*., Vol. I, Subtabs B-2 to B-6; Vol. II, Subtabs B-2 to B-4, Subtab B-6, and his "supporting" witness provided no real corroboration for his claims, *id*., Vol. I, Subtab B-5; Vol. II, Subtab B-7.

in response to the August 15, 2006 memorandum. The record reflects that the agency granted all the appellant's FMLA leave requests to that point, and had even accommodated his requests for additional leave beyond the requirements of the FMLA. For instance, the EEO investigative file contains testimony from the Chief of Medical Services that the agency had granted the appellant over 40 weeks of leave between July 2005 and November 2006. IAF, Tab 5, Vol. II, Subtab B-3 at 230, 243-44.

¶18 Thus, we find that the appellant has not shown by preponderant evidence that a reasonable person in the appellant's position would have felt compelled to resign.

¶19 The appellant also claims that the agency denied his request for reinstatement after he was granted the extension to provide medical documentation in response to the August 15, 2006 memorandum. PFRF, Tab 1 at 5; IAF, Tab 3 at 2. To the extent the appellant is arguing that he rescinded his resignation, the contention is baseless. The appellant set the effective date for his resignation as September 1, 2006, as was his right under 5 C.F.R. § 715.202(a).[4] IAF, Tab 5, Vol. III, Subtab C-7 at 464-65. The agency was not required to accept any attempt to rescind the resignation after that date. *See McDermott v. Department of Justice*, 82 M.S.P.R. 19, ¶ 12 (an employee has no right to withdraw a resignation after its effective date), *review dismissed*, 215 F.3d 1349 (Fed. Cir. 1999) (Table). Moreover, the record suggests that the appellant never actually sought to withdraw his resignation. The human resources specialist

[4] There is some confusion as to when the agency processed the resignation. The agency never provided the Board with a final SF-50, and the human resources specialist initially stated that the resignation had not been processed as of November 2006, IAF, Tab 5, Vol. II, Subtab B-6 at 310, and later stated that it was processed shortly after it was submitted, *id.*, Vol. I, Subtab B-4 at 5-8. However, this is of no moment. An employee sets the effective date of his resignation, and an agency's delay in processing it is irrelevant. *Robinson v. U.S. Postal Service*, 50 M.S.P.R. 433, 437-38 (1991); 5 C.F.R. § 715.202.

stated that he attempted to contact the appellant in September and October to verify his intentions, but the appellant never responded. IAF, Tab 5, Vol. II, Subtab B-6 at 307-08, 312; Vol. III, Subtab C-11 at 534. In addition, the appellant's subsequent correspondence reaffirms that he quit as of September 1, 2006. *Id*., Vol. III, Subtab C-11 at 532. Indeed, there is no evidence that the appellant ever sought to be reinstated to his prior position in Washington, D.C.; rather, he seeks a new position near his home in Charlotte, North Carolina. PFRF, Tab 1 at 6.

¶20 Lastly, the appellant suggested below that his resignation was prompted, in part, by the agency providing misinformation that, if he quit, he would be rehired after any confusion about his leave was resolved. IAF, Tab 3 at 2. The appellant raised the issue in the tersest form, without any detailed argument or supporting evidence. His bare allegation is offset by the human resource specialist's statement that he never gave the appellant any such advice, instead only telling him that after a voluntary resignation he could apply for a new federal position and be "reinstatement eligible." IAF, Tab 5, Vol. I, Subtab B-4 at 9-10. Notably, the human resource specialist's account is supported by the appellant's actions. The appellant did not refer to possible reinstatement in his resignation, and his subsequent correspondence only reiterated that he had quit. *Id*., Vol. III, Subtab C-7 at 465; Subtab C-11 at 532.[5]

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[5] The evidence contradicting the appellant's bare allegation of misinformation is contained in the EEO investigative file, which the agency submitted just prior to the day the administrative judge had set as the close of the record date. IAF, Tab 2 at 3, Tab 5. Although an appellant's substantive rights may be prejudiced when he is not permitted to respond to an agency's evidence submitted just prior to the close of record date, *see Nordhoff v. Department of the Navy*, 68 M.S.P.R. 45, 48 (1995), this is not such a case. The appellant has not attempted to rebut the agency's evidence on this issue, either below or on petition for review. Moreover, the appellant's submissions below indicate that he previously had access to the investigative file, and he has relied upon the information in that file to support his jurisdictional arguments. IAF, Tab 1 at 3, Tab 3 at 1; PFRF, Tab 1 at 3.

¶21 Accordingly, considering the totality of the circumstances, we conclude that the appellant has failed to prove that his resignation was involuntary. We therefore dismiss the appeal for lack of jurisdiction.

ORDER

¶22 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the

court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.